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Recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law

Note by the Secretariat

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I. Introduction

1. This note sets forth revisions of the draft guide to enactment of the draft model law on recognition and enforcement of insolvency-related judgments as agreed by Working Group V (Insolvency Law) at its fifty-third session (New York, 7–11 May 2018). The report of that session is contained in document A/CN.9/937. This note should be read in conjunction with the text of the draft guide, which is set forth in document A/CN.9/WG.V/WP.157 and the latest version of the draft model law, which is contained in the annex to document A/CN.9/937.
2. Minor amendments are indicated by reference to the paragraph of the report of the fifty-third session (A/CN.9/937, chapter IV.B) in which they were recorded. Where redrafting of a paragraph was requested at that session, the revised text of that paragraph, as proposed by the Secretariat, is included in this note.
3. It is intended that the guide to enactment, as published, will include the final text of the articles of the model law once both texts have been finalized and adopted by the Commission.

II. Revisions to the draft guide to enactment contained in document A/CN.9/WG.V/WP.157

4. Paragraph 13, first sentence: delete the words “and its interpretation and application” (A/CN.9/937, para. 40).
5. Paragraph 18: replace the words “it is recommended that States” with the words “States may wish to” in the third sentence, delete the last sentence and add explanation of benefits of enacting the model law (A/CN.9/937, para. 41). From the third sentence, the paragraph might read:

“Therefore, in order to achieve a satisfactory degree of harmonization and certainty, States may wish to make as few changes as possible when incorporating the Model Law into their legal systems. That approach will not only assist in making national law as transparent and predictable as possible for foreign users. It will also contribute to fostering cooperation between insolvency proceedings as the laws of different States will be the same or very similar; to reducing the costs of proceedings because of greater efficiency in the recognition of judgments; and to improving consistency and fairness of treatment of insolvency judgments in the cross-border context.”

6. Chapter III.B: insert a section explaining references to “courts” (A/CN.9/937, paras. 19 and 39). The following section might be added after paragraph 27:

“Competent court or authority

“As indicated in article 2, subparagraph (c), the Model Law envisages that a judgment can be issued by a court or an administrative authority in the originating State, provided that a decision issued by an administrative authority has the same effect as a court decision. This usage is consistent with the approach taken to the concept of ‘court’ in the MLCBI (art. 2, subpara. (e)), and the UNCITRAL Legislative Guide on Insolvency Law (glossary, para. 8).

“Moreover, article 4 contemplates that the body competent to perform the functions of the Model Law with respect to recognition and enforcement in the receiving State may be either a court or administrative authority, as designated by the enacting State. For ease of reference, the Model Law uses the word ‘court’ to refer to that authority. In the event that the body designated under article 4 is an administrative authority, the State may wish to consider replacing the word ‘court’, where it refers to the receiving State, with the word ‘authority’.”

7. Paragraph 30: add a cross-reference to paragraph 57 (A/CN.9/937, para. 44(a)).

8. Paragraph 37: revise the paragraph (A/CN.9/937, paras. 42 and 44(b)). The paragraph might read as follows:

"37. As discussed in more detail in the article-by-article remarks below, the Model Law includes an optional provision that permits recognition of an insolvency-related judgment to be refused when the judgment originates from a State whose insolvency proceeding (being an insolvency proceeding that met the definition of that term as used in the Model Law) is or would not be susceptible of recognition under the MLCBI. Under the terms of the MLCBI, the insolvency proceeding may not be recognizable because that State is neither the location of the insolvency debtor's centre of main interests (COMI) nor of an establishment of the debtor (i.e. it is neither a main nor a non-main proceeding).

"37bis. That principle of non-recognition of insolvency proceedings under the MLCBI is acknowledged in article 13, subparagraph (h) of the Model Law, which is an optional provision for consideration by States that have enacted (or are considering enactment of) the MLCBI. The substance of subparagraph (h) also provides an exception to that general principle. The exception permits recognition of a judgment, notwithstanding its origin in a State whose insolvency proceeding is or would not be recognizable under the MLCBI, provided: (i) the judgment relates only to assets that were located in the originating State; and (ii) certain conditions are met. The exception could facilitate the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets. Such an exception with respect to the recognition of insolvency proceedings is not available under the MLCBI (discussed further below, paras. ...)."

9. Paragraph 41: delete the paragraph (A/CN.9/937, para. 44(c)).

10. Paragraph 44, last sentence: delete the last part of the sentence, commencing with the words "as that judgment" (A/CN.9/937, para. 44(d)). The last sentence of the paragraph will thus read:

"Subparagraph 2(d) of the Preamble confirms that the Model Law is not intended to apply to a judgment commencing an insolvency proceeding."

11. Paragraph 46: add examples of other possible exemptions from the scope of the model law (A/CN.9/937, para. 44(e)). The sentence might read as follows:

"These might include, for example, judgments concerning foreign revenue claims, extradition for insolvency-related matters, family law matters, or judgments relating to entities excluded from the Model Law, such as banks and insurance companies."

12. Paragraph 49: reflect that the "insolvency representative", although defined in the model law, might be referred to by different names in various jurisdictions (A/CN.9/937, para. 44(f)). The paragraph, after the first sentence, might read as follows (along the lines of the Legislative Guide on Insolvency Law, part two, chapter III, para. 35):

"Insolvency laws refer to the person responsible for administering the insolvency proceedings by a number of different titles, including 'administrators', 'trustees', 'liquidators', 'supervisors', 'receivers', 'curators', 'official' or 'judicial managers' or 'commissioners'. The term 'insolvency representative' is used in the Model Law to refer to the person fulfilling the range of functions that may be performed in a broad sense without distinguishing between those different functions in different types of proceeding. The insolvency representative may be an individual or, in some jurisdictions, a corporation or other separate legal entity."

13. Paragraph 55: replace the words "without more" with the words "without additional court orders" (A/CN.9/937, para. 44(g)).

14. Paragraph 57: remove the reference to first day orders (A/CN.9/937, para. 44(h)). That might be achieved by deleting the words "and other judgments that might in some jurisdictions be described as first day orders" in the third sentence and combining that sentence with the next sentence along the following lines:

"The Model Law does, however, cover judgments issued at the time of commencement of insolvency proceedings, such as appointment of an insolvency representative, judgments or orders addressing payment of employee claims and continuation of employee entitlements, retention and payment of professionals, acceptance or rejection of executory contracts, and use of cash collateral and post-commencement finance."

15. Subparagraph 59(d): revise the paragraph as follows (A/CN.9/937, para. 44(i)):

"Judgments determining whether the debtor owes or is owed a sum or any other performance not covered by subparagraph (a) or (b). The enacting State will need to determine whether this category should extend to all such judgments regardless of when the cause of action arose. While it might be considered that a cause of action that arose prior to the commencement of the insolvency proceedings was sufficiently linked to the insolvency proceeding, as it was being pursued in the context of, and could have an impact on, that proceeding, it might also be considered that a judgment on such a cause of action could have been obtained by or against the debtor prior to the commencement of the insolvency proceeding and, thus, lacked a sufficiently material association with the insolvency proceedings."

16. Paragraph 63, last sentence: add the word "could" before the word "apply" (A/CN.9/937, para. 44(j)).

17. Paragraph 73: delete the paragraph in the light of the clear explanation already contained in paragraph 72 (A/CN.9/937, para. 44(k)).

18. Paragraph 78: delete the fifth sentence starting with the word "Thus" and the first part of the sixth sentence up to the words "a decision" (A/CN.9/937, para. 44(l)). The fourth and fifth sentences will thus read:

"Enforcement, on the other hand, means the application of the legal procedures of the receiving court to ensure compliance with the judgment issued by the originating court. A decision to enforce the judgment must, for the purposes of the Model Law, be preceded or accompanied by recognition of the judgment."

19. Paragraph 80, first sentence: replace the words "review by an appellate court" with the words "review by way of an appeal to an appellate court" (A/CN.9/937, para. 44(m)).

20. Paragraph 83: replace the words "entitlement to apply" with the words "the conditions for applying" and the word "defines" with the word "sets" (A/CN.9/937, para. 44(n)). Noting that the last sentence of paragraph 83 as drafted was taken from the Guide to Enactment and Interpretation of the MLCBI (see para. 127), add a cross-reference to article 10, paragraph 2 (A/CN.9/937, para. 46). Paragraph 83 might thus read:

"Article 10 establishes the conditions for applying for recognition and enforcement of an insolvency-related judgment in the enacting State, as set out in paragraph 2, and the core procedural requirements. Article 10 thus provides a simple, expeditious structure to be used for obtaining recognition and enforcement."

21. Paragraph 110, first sentence: add the word "solely" before the words "on a ground" (A/CN.9/937, para. 44(o)).

22. Paragraph 111: add the following sentences at the end of the paragraph (A/CN.9/937, para. 44(p)):

"The originating court does not need to have explicitly relied on or made findings regarding the relevant basis for jurisdiction, so long as that basis for jurisdiction existed at the relevant time. The originating court's reliance on additional or different jurisdictional grounds does not prevent one of the 'safe harbours' from applying."

23. Paragraph 113: delete the fourth sentence and the first part of the last sentence up to the words "it does not prevent" (A/CN.9/937, para. 44(q)). To adjust the drafting, the third and fourth sentences might read:

"The method of raising the objection to jurisdiction is a matter for the law of the originating State. A receiving court, in an appropriate case, may make inquiries where matters giving rise to concern become apparent."

24. Between paragraphs 115 and 116, heading relating to subparagraph (h): delete the phrase "and relating only to assets" (A/CN.9/937, para. 44(r)).

25. Paragraph 118: move the paragraph before paragraph 117 (A/CN.9/937, para. 44(s)).

26. Paragraph 121: delete the last sentence (A/CN.9/937, para. 44(t)).

27. Paragraph 121 and paragraph 122, second sentence: replace references to "relief" with references to "a form of relief" (A/CN.9/937, para. 44(u)).

28. Paragraph 126: add the following sentence at the end of the paragraph (A/CN.9/937, para. 44 (v)):

"The enactment of this provision is not necessary in jurisdictions where the MLCBI is interpreted as covering the recognition and enforcement of insolvency-related judgments".